

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER H2002-001

June 14, 2002

ALBERTA MENTAL HEALTH BOARD

Review Number H0015

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Summary: The Applicant made a request to the Alberta Mental Health Board (“the Custodian”) under the *Health Information Act* (“the Act”), for access to his entire patient record. The record involved health information from two involuntary admissions. The Custodian refused to disclose any information to the Applicant.

The Custodian said it was prohibited from disclosing some of the health information under s. 11(2)(a) of the Act as the information was about other individuals. The Custodian said it was exercising its discretion to refuse to disclose any of the health information under s. 11(1)(a) as the disclosure of any health information whatsoever could reasonably be expected to result in immediate and grave harm to the Applicant, a threat to the health or safety of another individual or a threat to public safety.

The Custodian said it was exercising its discretion to refuse to disclose some of the health information pursuant to s. 11(1)(b) as the disclosure could reasonably lead to the identification of a person who provided health information in confidence, and pursuant to s. 11(1)(e) as the disclosure could reasonably be expected to prejudice the use or results of diagnostic tests or assessments.

The Commissioner found that some of the health information met the requirements of section 11(2)(a) of the Act and must not be disclosed. The Commissioner found that

some of the health information met the requirements of section 11(1)(a)(ii) (threat to mental or physical health or safety of another individual), section 11(1)(b) and section 11(1)(e) and that discretion was properly exercised. The Commissioner upheld the decision of the Custodian to refuse to disclose that information. However, none of the information met the requirements of section 11(1)(a)(i) (harm to applicant) or section 11(1)(a)(iii) (threat to public safety) of the Act.

The Commissioner ordered the Custodian to disclose all of the 536 pages of the records, with limited severing. The disclosure may be done in two stages.

Statutes Cited: AB: *Health Information Act*, R.S.A. 2000, c. H-5, ss. 1(1)(i), 1(1)(m), 11(1)(a)(i), 11(1)(a)(ii), 11(1)(a)(iii), 11(1)(b), 11(1)(e), 11(2)(a), 79, 80(2), *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 18, 20.

Authorities Cited: AB: Orders 96-003, 96-004, 2001-010.

Cases Cited: McInerney v. MacDonald (1992) 93 D.L.R. (4th) 415 (SCC).

I. BACKGROUND

[para 1.] In correspondence dated May 17, 2001, the Applicant made an access request to the Alberta Mental Health Board (“AMHB”) or the Custodian. The request was for all the patient records for two admissions to Alberta Hospital Edmonton.

[para 2.] The Applicant requested:

I demand complete, total and absolute uninhibited access to my complete and total patient records during my previous ~~incarcerations~~ pleasant stays under the ~~control~~ care of [physician name] (Feb 25 to Mar 15/95) and [physician name] (Aug 9 to 20/97). My motive I can assure you is honourable with only the best intentions in mind. Failure to comply will lead to consequent action.

[para 3.] The AMHB responded to the access request under the *Health Information Act* (the “Act”). The AMHB advised the Applicant that it was refusing access to all the information requested. The AMHB advised the Applicant that this refusal was based upon sections 11(2)(a), 11(1)(a), 11(1)(b) and 11(1)(e) of the Act.

[para 4.] On August 19, 2001, the Applicant requested a review of the AMHB’s refusal to disclose the information. Mediation was unsuccessful and the matter was set down for an oral inquiry. The Applicant and the AMHB provided written submissions. The AMHB provided an ‘in camera’ written submission and affidavit evidence of a psychiatrist. None of the four identified Affected Parties provided written submissions.

[para 5.] The Applicant and the AMHB provided oral submissions at the inquiry. The AMHB called a staff member to give evidence at the oral inquiry. As part of its oral ‘in

camera' submission the AMHB called a psychiatrist to give evidence. The Applicant called his wife to give evidence as part of his oral submission. The Applicant's family physician also gave oral evidence. On June 10, 2002, the AMHB provided a severed copy of the records/information.

II. RECORDS/INFORMATION

[para 6.] The records/information at issue are comprised of six files. The AMHB labeled these files as 1995 Admission, 1997 Admission, ADT IS (Admission Discharge Transfer Information System) Printouts, EEG (Electroencephalogram), CDRC (Clinical Diagnosis and Research Center) & NP (Neuropsych), and Correspondence. There are 536 pages of records/information.

III. ISSUES

[para 7.] The following four issues were addressed in this inquiry:

Issue A: Does section 11(2)(a) of the Act apply to the records/information?

Issue B: Did the Custodian properly apply section 11(1)(a) of the Act to the records/information?

Issue C: Did the Custodian properly apply section 11(1)(b) of the Act to the records/information?

Issue D: Did the Custodian properly apply section 11(1)(e) of the Act to the records/information?

IV. DISCUSSION

Preliminary Issue: Is there health information?

[para 8.] The right of access of an individual under the Act extends to records containing health information about the individual (s. 7(1)). The right of access does not extend to records/information that custodians must or may refuse to disclose under section 11. However, where information can be severed the right of access extends to the balance of the records/information (s. 7(2)).

[para 9.] Health information includes registration, health services provider information and diagnostic, treatment and care information. Diagnostic, treatment and care information includes physical and mental health, health services and any information collected when health services are provided (s. 1(1)(i)). Health services may be provided for various purposes including the diagnosis and treatment of illness (s. 1(1)(m)).

[para 10.] There is no dispute that all of the records/information requested by the Applicant contain health information. I find that all of the records/information withheld by the AMHB involve health information. I will now consider whether the provisions claimed by the AMHB apply to the records/information withheld. I will consider the mandatory provision first.

Issue A: Does section 11(2)(a) of the Act apply to the records/information?

1. General

[para 11.] Section 11(2)(a) of the Act says:

11(2) A custodian must refuse to disclose health information to an Applicant

(a) if the health information is about an individual other than the applicant, unless the health information was originally provided by the applicant in the context of a health service being provided to the applicant,

[para 12.] For section 11(2)(a) to apply, there must be health information about another individual. However, section 11(2)(a) does not apply if the applicant provided the health information. Section 11(2) is a mandatory (“must”) exception to disclosure. This means that if the records/information fall within section 11(2), the custodian must refuse access.

2. Is there health information about another individual?

[para 13.] In its written submission, the AMHB says some of the records/information that were refused contain health information about an individual other than the Applicant. The Applicant did not dispute the duty of the AMHB to withhold information about another individual.

[para 14.] In the severed copy of the records/information, the AMHB says that section 11(2)(a) applies to portions of eight pages of the “ADT IS Printouts” file. The severed portions include names, health status, gender, date of birth, admission and discharge dates for other patients at Alberta Hospital Edmonton.

3. Conclusion under section 11(2)(a)

[para 15.] I find that parts of the severed portions of the records/information are health information about another individual so section 11(2)(a) of the Act applies. Section 11(2)(a) applies to the portions of the records/information that are marked with pink highlighter. The AMHB must not disclose that information.

[para 16.] I will now consider whether the other provisions claimed by the AMHB apply to the balance of the records/information. Section 11(1) provisions are discretionary (“may”) exceptions to disclosure. If a discretionary section applies, the custodian has the authority to refuse access but must properly exercise its discretion.

Issue B: Did the Custodian properly apply section 11(1)(a) of the Act to the records/information?

1. General

[para 17.] Section 11(1)(a) of the Act says:

- 11(1) A custodian may refuse to disclose health information to an applicant
- (a) if the disclosure could reasonably be expected
 - (i) to result in immediate and grave harm to the applicant's mental or physical health or safety,
 - (ii) to threaten the mental or physical health or safety of another individual, or
 - (iii) to pose a threat to public safety.

For section 11(1)(a) to apply, the custodian must establish that the disclosure of health information to the applicant could reasonably be expected to result in one of the above situations.

2. Could disclosure of the health information reasonably be expected to result in harm or a threat to health or safety?

[para 18.] There are orders under the *Freedom of Information and Protection of Privacy Act* ("FOIP" Act) that considered provisions that are similar to section 11(1)(a)(ii) and 11(1)(a)(iii) of the Act. In Order 2001-010, the Commissioner adopted the following test for harm under section 18 of the FOIP Act (this test was developed in Order 96-003 for section 20 harm under the FOIP Act):

- a. there must be a reasonable expectation of probable harm;
- b. the harm must constitute damage or detriment and not mere inconvenience; and
- c. there must be a causal connection between disclosure and the anticipated harm.

[para 19.] In Order 2001-010, the Commissioner said there must be evidence of a direct and specific threat to a person, and a specific harm flowing from the disclosure of information or the record. In Order 96-004, the Commissioner said detailed evidence must be provided to show the threat and disclosure of the information are connected and there is a probability that the threat will occur if the information is disclosed.

[para 20.] In its submission, the AMHB says the common law principles established by the Supreme Court of Canada in McInerney v. MacDonald apply to the right of patients to access their health information. McInerney says that access should be given to patients unless there is a "significant likelihood of a substantial adverse effect on the physical, mental or emotional health of the patient or harm to a third party". However, the criteria in the Act are slightly different from the McInerney test, and it is the criteria under the Act that I must consider.

[para 21.] The AMHB says the Applicant has a progressive mental illness that is characterized by a lack of insight and instability and a poor prognosis. The AMHB says the Applicant has been acutely ill in the past, such as during the two admissions to Alberta Hospital Edmonton (“AHE”). The AMHB says the Applicant refused treatment during these two admissions, signed himself out against medical advice and did not receive follow-up care.

[para 22.] Patients at AHE are given a copy of their Admission Certificates when involuntarily committed. In evidence at the oral inquiry, the psychiatrist said he could not recall any reaction whatsoever from the Applicant when he was given copies of his Admission Certificates. I note the Applicant attached a copy of his Admission Certificates from the first admission to AHE with his written submission.

[para 23.] The AMHB provided oral and affidavit evidence in their ‘in camera’ submissions. The evidence of the psychiatrists was that the Applicant should not be given a copy of the patient record as he had refused treatment. One of the psychiatrists said the records should not be disclosed without appropriate medical supervision and interpretation. These psychiatrists only saw the Applicant during his admission to AHE and they did not see him before or after the respective admission.

[para 24.] A member of the AHE staff gave verbal evidence and said the Applicant verbally threatened her because she refused to give him a copy of the hospital record. The Applicant verbalized that the staff member was being truthful about her feelings and that from what she was saying he knew that he had frightened her. The Applicant emphatically stated that he had not intended to frighten her or anyone else.

[para 25.] The Applicant said that sometimes people were frightened of him although he did not intend to frighten them, as his intentions were sometimes misunderstood. The Applicant said he has never threatened harm to others or actually harmed anyone. He said this was the case even when he caught a person breaking into his garage and after his home and garage had been broken into a number of times.

[para 26.] In September of 1997 a copy of the Applicant’s hospital record for the two AHE admissions were sent to Dr. Shumborski, who is the Applicant’s general practitioner. The information was sent so the Applicant could “read his entire chart”. The AMHB says this disclosure was not a concern as the information was provided to a qualified physician who could decide the appropriateness and extent of information given to the Applicant. The AMHB said it did not know how much health information Dr. Shumborski gave to the Applicant.

[para 27.] The Applicant said he did get upset when he read the AHE records in the past because of the errors in the records. He said the errors were particularly upsetting when the information was used to take away his liberty, treat him against his wishes and give him a diagnosis that he believed was wrong. In his oral evidence, the Applicant said that being restrained and given medication against his will was the “male equivalent of being raped”.

[para 28.] The Applicant's wife also said some of the information in the records was factually inaccurate, and this had upset her husband more than anything else about the records. The Applicant said his reaction to the inaccurate information was to talk to his wife, his family doctor and try to tell AMHB staff about the errors. The Applicant's wife confirmed that this was how her husband had reacted to receiving the AHE records in the past.

[para 29.] Dr. Shumborski has been the Applicant's general practitioner since before the first admission to AHE . He sees the Applicant on a fairly regular basis either when the Applicant comes in for routine medical care or when he brings family members in. Dr. Shumborski said the Applicant came in to see him because he was 'very upset' with the way he was treated during the first involuntary admission to AHE. Dr. Shumborski said the Applicant's reaction was verbal only and they had a long talk about his concerns.

[para 30.] Dr. Shumborski said that even on the occasions when he saw the Applicant when he was very upset the Applicant did not harm himself, threaten others or create a threat to public safety. Dr. Shumborski said if he had ever thought the Applicant might harm himself or others, he would have referred him to a specialist. He has never had occasion to make such a referral for the Applicant.

[para 31.] In contrast to the evidence provided by the AMHB, Dr. Shumborski said the Applicant stayed on medication for a long time after the first discharge from AHE in March of 1995. The Applicant stayed on medication until some time after he renewed the prescription in January of 1996. He did eventually discontinue the medication. Dr. Shumborski said the medicine did not agree with the Applicant and he "was pretty much the same" after he stopped taking the medication.

[para 32.] Dr. Shumborski said the Applicant asked for help to get his hospital records for an earlier psychiatric admission to the Royal Alexandra Hospital ("RAH"). Initially the RAH physician was concerned that the Applicant would not understand what the records said. However, by April of 2000, the RAH doctor had given the Applicant his records. Dr. Shumborski said he was not aware of any problems following this disclosure of hospital records to the Applicant.

[para 33.] Dr. Shumborski said the Applicant also asked him for help to get his AHE hospital records. The AMHB sent Dr. Shumborski a copy of some of the AHE records pursuant to his request. He said he tried to explain the records to the Applicant, but he didn't seem too interested in his explanation. Dr. Shumborski said the Applicant had a good understanding of his diagnosis from AHE, but did not believe the diagnosis was correct.

[para 34.] Dr. Shumborski said the Applicant wanted to take the AHE records home and read them. He knew he could readily contact Dr. Shumborski with any questions. Dr. Shumborski could not recall any concerns that arose when the Applicant received the earlier AHE records. The information that has already been disclosed to the Applicant is part of the information involved in this access request.

[para 35.] The Applicant's wife said that she thought the AHE admissions were a 'drug induced psychosis'. Once the drugs wore off, he was okay again. The wife thought the medical diagnosis from AHE was wrong. She did not have concerns about her husband getting the AHE records requested. She said she did not have safety concerns for herself, her children, her husband or anyone else. Her husband had already seen some of these medical records, without incident.

[para 36.] The Applicant's wife said it was the withholding of the AHE records that was so upsetting to her husband. She was candid and unequivocally stated that she had no doubt that 'he could handle' the information. She said her husband needed to get the records to help him to deal with those difficult times, to reach closure and 'to get on with his life'.

[para 37.] In its written and oral submissions the AMHB said that disclosure of any information whatsoever from the six AHE files could reasonably be expected to result in harm to the Applicant's health or safety, to threaten the health or safety of other individuals and to create a threat to public safety. The two psychiatrists agree with this view of the AMHB.

[para 38.] However, the AMHB has recently provided me with a severed copy of the records/information. The severed copy claims only subsection 11(1)(a)(ii) (threat to other individuals) for some of the information in the six files, rather than the previous claim of section 11(1)(a) for all of the records/information.

[para 39.] The severed portions of the records/information that claim section 11(1)(a)(ii) consist mostly of staff names, signatures and initials. I accept that the staff member who gave evidence feels threatened by the Applicant regardless of a lack of intent by the Applicant to threaten others.

[para 40.] In his written and oral submissions, the Applicant vigorously denied that disclosure of the records/information could reasonably be expected to result in harm to his health or safety, threaten the health or safety of other individuals, or pose a threat to public safety. The Applicant's wife and general practitioner, who know the Applicant well, agree with the Applicant.

[para 41.] Under subsection 11(1)(a)(ii) of the Act the AMHB can refuse to disclose health information to the Applicant if the disclosure could reasonably be expected to 'threaten the mental or physical health or safety of another individual'. The test adopted in Order 2001-010 requires a reasonable expectation of probable harm, harm that is damage or detriment rather than mere inconvenience and a causal connection between the disclosure and the anticipated harm.

[para 42.] The Applicant has already received hospital records without incident. The Applicant's wife and general practitioner, who see the Applicant on a regular basis, do not believe disclosure would cause harm to the Applicant or a threat to other individuals or the public. Part of the concern expressed by the AMHB is disclosure

without medical supervision. However, the Applicant has ready access to his general practitioner and has already discussed some of the AHE records with him.

[para 43.] The evidence provided 'in camera' led me to believe that there was a connection between the Applicant's refusal to accept the treatment recommended by the AMHB and the refusal to provide access. However, the refusal of treatment in and of itself, is not the test for refusal of access under the Act.

[para 44.] Applying the evidence before me to the criteria in the Act and the test adopted in Order 2001-010, I find that disclosure of the names, signatures and initials of staff and other identifying information could reasonably be expected to threaten the mental or physical health or safety of other individuals. The AMHB has properly exercised its discretion.

[para 45.] However, I find the AMHB has not discharged its burden of proof to show that disclosure of any portion of the records/information could reasonably be expected to result in immediate and grave harm to the Applicant's mental or physical health or safety under subsection 11(1)(a)(i) or to pose a threat to public safety under subsection 11(1)(a)(iii) of the Act.

3. Conclusion under section 11(1)(a)

[para 46.] Subsections 11(1)(a)(i) and 11(1)(a)(iii) do not apply, and I do not uphold the AMHB's decision to refuse to disclose any part of the records/information under those provisions. Subsection 11(1)(a)(ii) applies to the portions of the records/information that are marked with green highlighter, so I uphold the decision of the AMHB to refuse to disclose that information.

Issue C: Did the Custodian properly apply section 11(1)(b) of the Act to the records/information?

1. General

[para 47.] Section 11(1)(b) of the Act says:

11(1) A custodian may refuse to disclose health information to an applicant

...

(b) if the disclosure could reasonably lead to the identification of a person who provided health information to the custodian explicitly or implicitly in confidence and in circumstances in which it was appropriate that the name of the person who provided the information be kept confidential,

[para 48.] For section 11(1)(b) to apply, the disclosure of health information to the applicant must reasonably lead to the identification of another individual. The other individual must have provided health information in confidence to the custodian. The circumstances must be such that the name of the other individual should be kept confidential.

2. Would disclosure of the health information reasonably lead to the identification of another individual who provided health information in confidence and where the name of the other individual should be kept confidential?

[para 49.] In its written submission the AMHB says that disclosure of some of the records/information would identify other individuals who provided health information implicitly in confidence. The AMHB says that involuntary committals at AHE are circumstances where individuals should be assumed to have implicitly given health information in confidence and where names of others should be kept confidential. The Applicant did not dispute the decision of the AMHB to withhold this information.

[para 50.] In the severed copy of the records/information, the AMHB says that section 11(1)(b) applies to parts of four files. The AMHB has labeled these files as the 1995 Admission, 1997 Admission, CDRC (Clinical Diagnosis and Research Center) & NP (Neuropsych) and Correspondence.

[para 51.] I note that some of the severed portions of the records/information describe individuals who provided health information during the admissions to AHE. These other individuals are described by name or referred to by relationship or by specific information that could reasonably lead to their identification.

3. Conclusion under section 11(1)(b)

[para 52.] Disclosure of some portions of the records/information could reasonably lead to identification of other individuals who provided information implicitly in confidence and whose names should be kept confidential. The AMHB has properly exercised its discretion. Section 11(1)(b) applies to the portions of the records/information that are marked with blue highlighter. I uphold the decision of the AMHB to refuse to disclose that information.

Issue D: Did the Custodian properly apply section 11(1)(e) of the Act to the records/information?

1. General

[para 53.] Section 11(1)(e) of the Act says:

11(1) A custodian may refuse to disclose health information to an applicant

...

(e) if the information relates to

- (i) procedures or techniques relating to audits to be conducted or diagnostic tests or assessments to be given,
- (ii) details of specific audits to be conducted or of specific tests or assessments to be given, or
- (iii) standardized diagnostic tests or assessments used by a custodian, including intelligence tests,

and disclosure of the information could reasonably be expected to prejudice the use or results of particular audits, diagnostic tests or assessments.

[para 54.] For section 11(1)(e) to apply, the disclosure of health information to the applicant must relate to diagnostic or specific tests or assessments to be given. In addition, the disclosure of the information must reasonably be expected to prejudice the use or results.

2. Does the health information relate to diagnostic tests or assessments where disclosure of the information could reasonably be expected to prejudice the use or results of the tests or assessments?

[para 55.] In its written submission the AMHB says that parts of the records/information relate to diagnostic tests or assessments used by the custodian. The Applicant did not make a submission on this issue. In the severed copy of the records/information, the AMHB says that section 11(1)(e) applies to parts of 22 pages in three files. The AMHB has labeled these files as the 1995 Admission, CDRC (Clinical Diagnosis and Research Center) & NP (Neuropsych) and Correspondence.

[para 56.] I note that the severed portions of the records/information involve diagnostic tests or assessments conducted by the AMHB such as aptitude and personality tests. The severed information provides explanations of the purposes and results of the tests as well as test results described either in raw responses or in scaled scores. The severed portions of the records/information involve diagnostic tests or assessments conducted by AHE.

[para 57.] The individual raw responses on tests could affect the results of subsequent tests. However, I have no evidence before me to show that disclosure of any other information could reasonably be expected to prejudice the use or results of tests or assessments. The Custodian has the burden of proof pursuant to section 79 of the Act to show that the Applicant does not have a right of access.

3. Conclusion under section 11(1)(e)

[para 58.] Disclosure of some portions of the records/information could reasonably be expected to prejudice the use or results of diagnostic tests or assessments. The AMHB has properly exercised its discretion. Section 11(1)(e) applies to the portions of the records/information that are marked with yellow highlighter, so I uphold the decision of the AMHB to refuse to disclose that information.

V. ORDER

[para 59.] I make the following order under section 80(2) of the Act:

- ◆ I find that section 11(2)(a) of the Act applies to portions of the records/information that are marked with pink highlighter. I order the Custodian not to disclose that information.
- ◆ I find that the Custodian properly applied section 11(1)(a) (ii) of the Act to portions of the records/information and properly exercised its discretion, but subsections 11(1)(a)(i) and 11(1)(a)(iii) do not apply. I uphold the Custodian's decision to withhold the portions of the records/information that are marked with green highlighter.
- ◆ I find that the Custodian properly applied section 11(1)(b) of the Act to portions of the records/information and properly exercised its discretion. I uphold the Custodian's decision to withhold the portions of the records/information that are marked with blue highlighter.
- ◆ I find that the Custodian properly applied section 11(1)(e) of the Act to portions of the records/information and properly exercised its discretion. I uphold the Custodian's decision to withhold the portions of the records/information that are marked with yellow highlighter.
- ◆ I order the Custodian to disclose the balance of the records/information to the Applicant. Disclosure may be made in two stages. The specific records/information that are disclosed at each stage are at the discretion of the Custodian. However, all the balance of the records/information must be disclosed to the Applicant by the end of the 50-day compliance period.
- ◆ I order the Custodian to notify me in writing within 50 days of being given a copy of this Order, that it has complied with this Order.

Frank Work, Q. C.
Information and Privacy Commissioner